FCC 94-212

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	)	
	)	GN Docket Nc. 93-252
Implementation of Sections 3(n) and 332 of the Communications Act	)	
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144
	)	
Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553

THIRD REPORT AND ORDER

Adopted: August 9, 1994; Released: September 23, 1994

By the Commission:

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I. INTRODUCTION

1. In this Third Report and Order, we complete the initial implementation of Sections 3(n) and 332 of the Communications Act of 1934,[1] as amended by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993.[2] As required by Congress, we adopt changes to our technical, operational, and licensing rules for common carrier and private mobile radio services that are necessary to implement the statute and to establish regulatory symmetry among similar mobile services. The establishment of this regulatory framework also sets the stage for the future evolution of mobile services. In this respect, the rules we adopt today mark an important step in our continuing effort to enhance competition among mobile services providers, promote the development of new and technologically innovative service offerings, and ensure that consumer demand, not regulatory decree, dictates the course of the mobile services marketplace.

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[1] Communications Act of 1934, 47 U.S.C. §§ 151-713 ("Communications Act" or "Act").

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993) (Budget Act).

II. BACKGROUND

2. In the *CMRS Second Report and Order* in this docket, we initiated the process of implementing the Budget Act amendments to Sections 3(n) and 332 of the Act by interpreting the statutory definitions of "commercial mobile" radio service (CMRS) and "private mobile" radio service (PMRS).[3] We determined that Congress intended the CMRS classification to apply to all mobile services that are for profit and that provide interconnected service to the public or a substantial portion of the public. Applying this definition to our existing mobile services, we found that all common carrier mobile licensees and certain private radio licensees in the Specialized Mobile Radio (SMR), Business Radio, 220-222 MHz, and private paging services, regulated under Part 90 of the Commission's Rules, fell within the CMRS classification.[4] While we determined in the *CMRS Second Report and Order* that Part 90 licensees meeting the CMRS definition would be reclassified as CMRS providers, we deferred numerous other issues relating to the regulation of these reclassified licensees for a subsequent proceeding.[5]

3. Following the *CMRS Second Report and Order*, we adopted a Further Notice of Proposed Rule Making on April 20, 1994, to address pending issues relating to the implementation of the statute.[6] In particular, we sought to address the impact of the amended statute on our technical, operational, and licensing rules for all mobile services, and particularly on the rules affecting those Part 90 services that were reclassified as CMRS by the *CMRS Second Report and Order*. As required by Section 6002(d)(3) of the Budget Act, we proposed to amend these rules to the extent necessary to ensure that competing mobile

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[3] Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (*CMRS Second Report and Order*), Erratum, 9 FCC Rcd 2156 (1994).

[4] *Id.* at 1448-58 (paras. 82-109).

[5] The Budget Act sets forth a specific timetable for transition to the new regulatory structure. The statute establishes a one-year period from the date of enactment, *i.e.*, until the close of August 9, 1994, for us to make such changes to our existing service rules as are necessary to implement the amendments to Section 332 and to provide for an orderly transition. Budget Act, § 6002(d)(3). The statute also provides that for three years from the date of enactment, *i.e.*, until the close of August 9, 1996, existing private land mobile licensees that are reclassified as CMRS providers will continue to be regulated as private service providers. *Id.*, § 6002(c)(2)(B). Although some existing licensees in the described Part 90 services will be treated as PMRS providers for three years, the provisions of Section 332(c)(6) (foreign ownership) are immediately applicable to all reclassified licensees. *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, First Report and Order, 9 FCC Rcd 1056 (1994).

[6] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, 9 FCC Rcd 2863 (1994) (*Further Notice*).

services would be subject to comparable regulatory requirements, and that inconsistencies in our regulation of substantially similar services would be eliminated to the extent practical. We indicated that we would act on our proposals not later than the August 9, 1994, deadline established by Congress for adoption of rules implementing the statute.[7] On May 19, 1994, we revised the *Further Notice* on our own motion to seek comment on the additional issue of whether the amount of spectrum that CMRS licensees may aggregate in a given geographic area should be limited.[8] We received 61 comments and 70 reply comments in response to the *Further Notice*.[9]

III. DISCUSSION

A. EXECUTIVE SUMMARY

4. Last year, in the Budget Act, Congress created the CMRS regulatory classification and mandated that similar commercial mobile radio services be accorded similar regulatory treatment under the Commission's Rules. The broad goal of this action is to ensure that economic forces -- not disparate regulatory burdens -- shape the development of the CMRS marketplace.

5. The Budget Act directs the Commission to take certain steps toward that goal not later than August 9, 1994. These steps include revising our rules to ensure that services reclassified as CMRS by the Budget Act are "subjected to technical [and operational] requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services." We also must adopt rules for licensing CMRS, including reclassified services, pursuant to the radio common carrier licensing provisions of the Act. Finally, the Budget Act mandates that the Commission take appropriate steps to ensure an orderly transition to the new CMRS regulatory structure.[10]

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[7] *See* Budget Act, § 6002(d)(3).

[8] *See Further Notice*, 9 FCC Rcd at 2881-85 (paras. 86-105).

[9] *See* Appendix D for a list of pleadings and the short form references used to cite commenters. We will grant the motion of E.F. Johnson to accept its late-filed comments. Range Corporation d/b/a Range Telecommunications, an AMTA member, has filed an emergency petition to strike AMTA's comments and reply comments on the grounds that AMTA's support of the Nextel proposal does not represent the views of the SMR industry. Emergency Petition to Dismiss Comments and Reply Comments of the American Mobile Telecommunications Association, filed July 21, 1994. AMTA has opposed the petition. The arguments made by Range do not constitute reasons for the Commission to strike AMTA's filing, accordingly, we will deny Range's emergency petition. We do note that numerous members of the SMR industry, both large and small, have commented on Nextel's proposal in this proceeding and have expressed a wide diversity of views.

[10] Budget Act, § 6002(d)(3).

6. In this Order we take four steps to implement both the broad goal of the Budget Act and the more narrowly focused requirements generated by its August 9, 1994, transition deadline. First, in Section III.B., *infra,* we determine which reclassified services are "substantially similar" to existing common carrier services in order to implement the Budget Act requirement that such services be subject to "comparable" regulation. Second, in Section III.C., *infra,* we revise Part 90 and Part 22 technical and operational rules governing those services to ensure that the rules are, indeed, "comparable."

7. Third, in Section III.D., *infra,* to effectuate the broad congressional goal of ensuring that competition shapes the development of the CMRS market, we adopt rules that cap at 45 MHz the total amount of combined broadband personal communications services (PCS), cellular, and SMR spectrum in which an entity may have an attributable interest in any geographic area.

8. Fourth, in Section III.E., *infra,* to carry out Budget Act requirements concerning the licensing of CMRS services, we are adopting uniform rules for licensing CMRS services, including reclassified services. We are also modifying our licensing rules for Part 22 CMRS and Part 90 commercial services, where appropriate, to adopt filing windows for the filing of competing initial applications and conclude that competitive bidding procedures should be used to select from among mutually exclusive applications. Moreover, as we tentatively concluded in the *Further Notice*, we are taking the additional step of adopting a single, uniform application form for use by all CMRS and PMRS applicants in all terrestrial mobile services.

9. For the convenience of the reader, we summarize in the following section the principal decisions we are adopting in connection with each of the four actions taken in this Order. Before doing so, it is important to note that while all the rules adopted in this Order become effective on January 2, 1995, some of those rules do not apply immediately to the reclassified CMRS entities that will continue to be treated as private carriers under the grandfathering provisions of the Budget Act.[11] Specifically, until the grandfathered period ends on August 9, 1996, with regard to existing licensees, such entities will not be subject to technical, operational, or licensing rule changes made in this Order that apply exclusively to CMRS. Instead, they will be subject to regulation as private carriers under Part 90 of our Rules. Grandfathered carriers should note, however, that they are governed by modifications to our rules we make in this Order that are applicable to private carriers.

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[11] As discussed in the *CMRS Second Report and Order*, those entities are: (1) private land mobile licensees who have been reclassified as CMRS providers but were licensees in that service on or before August 9, 1993; and (2) private carrier paging licensees operating on frequencies allocated as of January 1, 1993, for private land mobile services, regardless of when they were licensed. (For ease of reference, these entities generally are referred to as "grandfathered carriers" in this Order.) Nothing in this Order alters our determinations in the *CMRS Second Report and Order* concerning the scope and effect of the grandfathering provision of the Budget Act.

1. *Substantially Similar Services*

10. We establish in this Order the framework for implementing the mandate of the Budget Act that we revise our rules to the extent necessary and practical to ensure that providers of reclassified CMRS services are subjected to technical and operational rules comparable to those that apply to providers of substantially similar common carrier services. To that end, our initial task is to identify reclassified CMRS services that are "substantially similar" to common carrier services.

11. The goals of the Budget Act serve as our guideposts for this task: (1) to create a level regulatory playing field for CMRS; (2) to establish an appropriate level of regulation for the administration of CMRS; (3) to resolve "substantial similarity" issues with a view toward ensuring that unwarranted regulatory burdens are not imposed on reclassified CMRS providers; and (4) to promote the economic goals we discussed in the *CMRS Second Report and Order*, including fostering economic growth, promoting investment in mobile telecommunications infrastructure, and enabling access to the national information superhighway.

12. Based on these goals, we conclude that the appropriate analytical framework for determining whether services are substantially similar is to assess whether licensees in those services actually or potentially compete to meet the needs and demands of consumers. We conclude that all reclassified private mobile radio services actually compete, or have the potential to compete within a reasonable time period, with existing commercial mobile radio services. In other words, we conclude that all CMRS -- including one-way messaging and data, and two-way voice, messaging, and data -- are competing services or have the reasonable potential to become competing services in the CMRS marketplace. Thus, on the basis of this competitive analysis, we find that all reclassified private services are substantially similar to existing commercial services, for purposes of Section 332 of the Communications Act.

13. This broad reading of the term "substantially similar" furthers the statutory purposes of promoting uniformity in CMRS regulation and, thereby, minimizes the potentially distorting effects of asymmetrical regulation. This reasoning also comports with our analysis of current and likely future competition in the CMRS marketplace. Actual competition among certain CMRS services exists already and, more importantly, the potential for competition among all CMRS services appears likely to increase over time due to expanding consumer demand and technological innovation. Such conditions argue for defining the class of "substantially similar" services expansively, at least for the limited purpose of establishing baseline technical and operational rules.

14. It is worth emphasizing the determinative relationship between the forward-looking policy goals embodied in the rule comparability requirement of the Budget Act and our assessment of competitive trends in the CMRS marketplace. Thus, we begin in this Order with our conclusion that mobile services will be treated as substantially similar if they compete against each other. Next, we have chosen to take an expansive view of the present

condition of competition among services in the CMRS marketplace, and of the potential for competition among these services in the future, because such a view maximizes the range of services that can be considered to be substantially similar. This in turn leads us to conclude that, to the extent practical, technical and operational rules should be comparable for virtually *all* existing and reclassified CMRS services. This conclusion furthers our policy objective of ensuring a level regulatory playing field for CMRS. We note, however, that an analysis performed in the context of a different set of policy goals, or application of the same policy goals to different circumstances, may result in different conclusions regarding the extent of competition.

2. *Comparable Technical and Operational Rules*

15. Our determination that actual and potential competition among CMRS services makes them "substantially similar" for purposes of Budget Act analysis carries over into our assessment of technical and operational rules. Simply put, we conclude that differences between rules governing actually or potentially competitive services should be conformed if we determine that the differences distort competition by placing unequal regulatory burdens on different classes of CMRS providers. Such conformity between rules will not be imposed, however, if we determine that, although the relative burdens imposed by the rules may not be identical, the cost of conforming the rules outweighs the benefit that might be gained thereby. Pursuant to this analytical framework, our principal determinations are as follows.

a. Service Area and Channel Assignment Rules

- *800 MHz SMR*: We adopt the principle that 800 MHz SMR systems should be licensed on a Major Trading Area (MTA) basis to the extent feasible, but request further comment on the specifics of licensing such systems to ensure that the interests of both existing licensees and potential entrants are taken into account. We will shortly issue a further notice of proposed rule making in our 800 MHz docket (PR Docket No. 93-144) regarding: (1) designating 200 contiguous SMR channels for MTA licensing based on 50-channel blocks; (2) continuing to license the remaining 80 SMR channels under existing rules; and (3) allowing incumbents to continue operating on existing channels. We decline to adopt a proposal by Nextel that certain 800 MHz incumbents be subject to mandatory retuning to new frequencies, but we will seek further comment on this issue. We further conclude that both existing SMR licensees and new entrants will be eligible for MTA licenses, with licensees to be selected by auction in the event of mutually exclusive applications. Finally, we conclude that in light of the fundamental changes to be implemented in 800 MHz licensing, we are suspending the acceptance of all new 800 MHz SMR applications, as of August 9, 1994.

- *900 MHz SMR*: We adopt MTA-based licensing of all 200 channels in blocks of 10 channels. We conclude that eligibility for MTA licenses will be open to existing licensees and new entrants, with competitive bidding to be used in the event of mutually

exclusive applications. Incumbent licensees who do not obtain MTA licenses will be entitled to continue operating under existing authorizations.

- *220 MHz Commercial Service*: We conclude that service area definitions and channel assignment rules applicable to licensing of 220 MHz systems should not be changed at this time. We will address such issues in a separate, future rule making proceeding.

- *Private Carrier Paging*: We adopt no conformance changes to existing Part 90 and Part 22 paging rules in this docket. In the *Part 22 Rewrite Order,*[12] we concluded that the concept of wide-area licensing of 931-932 MHz paging has merit but requires further study and comment. In the 929-930 MHz paging band, we are implementing the licensing system recently adopted in the *900 MHz PCP Exclusivity Order,*[13] which allows applicants to earn exclusivity for their systems on a local, regional, or nationwide basis, depending on system size and configuration. We will therefore defer further action until we examine the question of wide-area licensing and whether further conforming of our rules is feasible.

b. Other Technical and Operational Rules

- We conclude that no fundamental changes should be made to existing rules regulating co-channel interference, adjacent channel interference, or antenna height and transmitter power.

- We conclude that new interoperability requirements will not be adopted for CMRS equipment at this time, but we are retaining the existing interoperability rule applicable with regard to cellular service. We intend to explore the question of interoperability requirements for CMRS equipment in a future inquiry.

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[12] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Service, CC Docket No. 92-115, Amendment of Part 22 of the Commission's Rules To Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service, CC Docket No. 94-46, Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, CC Docket No. 93-116, Report and Order, FCC 94-201, adopted Aug. 2, 1994 (*Part 22 Rewrite Order*). Unless otherwise noted, all citations in this Order to Part 22 rules will reference the rules that are scheduled to take effect on January 1, 1995. Any reference to a Part 22 rule currently in effect will include a parenthetical noting that the citation is to the "current rule."

[13] Amendment of the Commission's Rules To Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, Report and Order, 8 FCC Rcd 8318 (1993) (*900 MHz PCP Exclusivity Order*), *recon. pending*.

- We adopt a uniform 12-month construction requirement for all CMRS licensees, except in instances in which the rules specify a longer period for systems of greater size or complexity.

- We eliminate loading requirements for CMRS, except that incumbent 900 MHz SMR licensees must meet current requirements for retaining channels at renewal.

- We adopt rules allowing a multi-station CMRS system to use a single call sign for station identification purposes.

- We eliminate existing user eligibility restrictions that prevent SMR, private carrier paging, Business Radio, and commercial 220 MHz licensees from providing service to foreign governments and their representatives. We also eliminate eligibility restrictions that prevent Business Radio licensees from providing service to individuals. We also eliminate the Part 90 restriction on common carrier communications for reclassified CMRS services.

- We apply existing Equal Employment Opportunity requirements to all CMRS licensees.

3. *Spectrum Aggregation Limit*

16. In this Order, we address the issue of imposing a cap on the amount of CMRS spectrum a licensee may aggregate in a given geographic area as a means of preventing potentially anticompetitive aggregation of CMRS spectrum. We conclude that to preserve competitive opportunities in the CMRS marketplace, it is unnecessary to establish, in addition to existing CMRS spectrum aggregations limitations, the broad CMRS spectrum cap proposed in the *Further Notice*. Rather, we conclude that our goals will be achieved by capping at 45 MHz the total amount of PCS, cellular, and SMR spectrum in which an entity may have an attributable interest in any geographic area. We adopt this cap as a minimally intrusive means of ensuring that the mobile communications marketplace remains competitive and retains incentives for efficiency and innovation.

17. We also reach the following determinations with regard to implementation of the spectrum cap. First, we conclude that various encumbrances on SMR spectrum *vis-à-vis* cellular or broadband PCS should be accounted for when measuring SMR spectrum for purposes of the cap. Therefore, we will attribute to an entity a maximum of 10 MHz of SMR spectrum, including both 800 and 900 MHz spectrum for purposes of determining compliance.

18. Second, we adopt a 20 percent cross ownership attribution rule for licensees other than designated entities.[14] Thus, when an entity other than a designated entity has a 20 percent or greater ownership interest in an SMR, cellular, or PCS license in a particular geographic area, the entire amount of spectrum associated with that license will be attributed to that entity for spectrum cap purposes. For designated entities, the attribution level will be a 40 percent or greater ownership interest.

19. Third, to compute an SMR spectrum total in a given market, the licensee must identify all attributable 800 MHz and 900 MHz SMR base stations located inside the MTA or BTA. All 800 MHz and 900 MHz channels located on at least one of those base stations count as 50 kHz and 25 kHz, respectively. This total can be reduced using a 10 percent population overlap test similar to that used for the current cellular-PCS spectrum cap.

4. *Licensing Rules and Procedures*

20. Section 332 of the Act, as amended by the Budget Act, provides that CMRS providers are to be "treated as common carriers for purposes of [the] Act." We conclude that this means, among other things, that all CMRS applications must comply with common carrier licensing procedures enumerated in Title III of the Act. Thus, we adopt rules that implement those procedures with regard to existing licensees and future applicants on SMR, Business Radio, 220 MHz, and Part 90 paging frequencies who provide or propose to provide service that meets the CMRS definition.

21. In particular, the following presents a partial list of measures we are adopting to ensure that CMRS applications under Part 90 comply with the statutory requirements for licensing of common carriers under Title III of the Act, as well as to streamline and unify processing of all CMRS and PMRS applications.

- *Application Forms and Procedures* -- We adopt a single unified application form (Form 600) for all CMRS and PMRS applicants in all terrestrial services. Form 600 will also be used to determine the regulatory classification of an applicant.

- *Qualifying Information* -- All parties to a CMRS application will be required to comply with the alien ownership restrictions of Section 310(b) of the Act and must also disclose whether: (1) any party has had a Commission license or permit revoked; (2) any party has been found by a court to have monopolized radio communication; or (3) any party has been convicted of a felony.

- *Application Fees and Regulatory Fees* -- Currently, application fees can only be changed by Congress. Therefore, the existing application fee schedule will continue to govern fee

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[14] Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies. *See* 47 CFR §§ 1.2110, 24.720.

requirements. If, however, Congress acts to extend to the Commission authority to modify the fee schedules, we will address the question of altering our regulatory fees at that time.

- *Public Notice and Petition To Deny Procedures* -- We adopt rules that apply the public notice and petition to deny procedures currently contained in Part 22 to all CMRS applicants. In addition to applications for initial licenses, these procedures will extend to applications for major modifications and for assignments and transfers of Part 90 CMRS licenses.

- *Mutually Exclusive Applications and Competitive Bidding* -- We adopt rule changes that will generally result in using 30-day notice and cut-off procedures and competitive bidding to select among mutually exclusive initial CMRS applications in Part 22 services (except for Phase I cellular unserved area applications), 900 MHz SMR service, and 800 MHz SMR service. For Phase I cellular applications we adopt a one-day filing window, concluding that such a window is sufficient because there is a date certain on which applications for unserved areas are permitted to be filed. We adopt no changes to application procedures for 929-930 MHz paging in Part 90, but note that some procedural changes are likely to be considered in the future.

- *Amendment of Applications and License Modification* -- We adopt rule changes that conform Part 22 and Part 90 definitions for initial applications and major and minor amendments and modifications, to the extent practicable. Modification applications will be accepted for filing on a first-come, first-served basis.

- *Conditional and Special Temporary Authority* -- We conclude that the waiting period for pre-grant construction for Part 22 CMRS should be reduced from 90 to 35 days, and we establish a 35-day waiting period for all CMRS. We also determine that Section 309(f) of the Act prohibits pre-grant operation under special temporary authority (STA) except in those cases in which the applicant establishes that there are "extraordinary circumstances" where a delay in operations would seriously prejudice the public interest.

Against this background, we now turn to a detailed discussion of the issues presented in this docket.

B. Comparison of Reclassified Part 90 Services and "Substantially Similar" Common Carrier Services

1. *Summary*

22. In this section, we establish the framework for implementing the Budget Act's mandate that CMRS licensees in reclassified services must be governed by technical and operational rules that are comparable to the like rules that apply to licensees providing

substantially similar common carrier services. To that end, our initial task is to identify the formerly private mobile services that are "substantially similar" to common carrier services.

23. Our guideposts for determining substantial similarity are the goals we have applied in establishing the CMRS classification. Our first goal is to create a symmetrical regulatory framework for commercial mobile radio services in order to foster economic growth and expanded service to consumers through competition. As explained in the *Further Notice*, Congress created CMRS as a new classification of mobile services to ensure that similar mobile services are accorded similar regulatory treatment.[15] Second, consistent with that objective, the Commission's role is to establish an appropriate level of regulation for the administration of CMRS.[16] Such a regulatory regime will ensure that the marketplace -- and not the regulatory arena -- shapes the development and delivery of mobile services to meet the demands and needs of consumers, except where relying on market forces might lead to a result that is harmful to competition or to consumers.[17] Third, we resolve issues regarding "substantial similarity" in this Order with a view toward ensuring that unwarranted regulatory burdens are not imposed on any Part 90 licensees who have been reclassified as commercial carriers.[18] Finally, our decisions in this Order regarding "substantial similarity" are intended to promote the economic goals and objectives we discussed in the *CMRS Second Report and Order*, including fostering economic growth, promoting investment in mobile telecommunications infrastructure, and expanding access to the national information superhighway.[19]

24. Based on these goals, we conclude that services should be considered substantially similar if they compete[20] or have the reasonable potential, broadly defined, to compete in meeting the needs and demands of consumers. We believe that this characterization is the

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[15] *Further Notice*, 9 FCC Rcd at 2866-67 (para. 13).

[16] *CMRS Second Report and Order*, 9 FCC Rcd at 1418 (para. 14).

[17] *Further Notice*, 9 FCC Rcd at 2866 (para. 12).

[18] *See CMRS Second Report and Order*, 9 FCC Rcd at 1418 (para. 15).

[19] *See id.* at 1419-22 (paras. 18-29).

[20] *Further Notice*, 9 FCC Rcd at 2866-67 (para. 13). We recognize that the extent to which commercial mobile radio services are able to compete against each other is affected to some degree by regulatory restrictions. For example, current rules restrict the offering of dispatch service by cellular carriers. *See* Section 22.911(d) of the Commission's Rules, 47 CFR § 22.911(d) (current rule); *but see* Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, GN Docket No. 94-90, Notice of Proposed Rule Making, FCC 94-202 (released Aug. 11, 1994)(*Dispatch Notice*). We are mindful of the need to exercise care in making "substantial similarity" determinations in this Order to take into account possible distortions in the competitive marketplace produced by current rules.

surest and most reasonable means of achieving our objectives in this rule making. As we discuss in greater detail below,[21] we have chosen this approach over suggestions that substantial similarity should be judged by technical differences among services because, to the extent that such technical distinctions result from previously disparate regulatory requirements, it is the purpose of the statute and the intent of the Commission to eliminate such disparities to the extent practical.

25. Considering the potential for competition likewise accords with our understanding of congressional intent. As we explained in the *Second Report and Order*, Congress intended that "similar services would be subject to consistent regulatory classification."[22] There is the risk that disparities in the current regulatory structure could interfere with the continued growth and development of CMRS and deny consumers the protections they need in the marketplace.[23] To achieve the scheme of regulatory symmetry sought by Congress, we must consider the continued growth and development of CMRS and how it may expand the range of competitive interaction between both current and developing services.

26. This conclusion is based principally on two factors. First, a broad reading of the term "substantially similar" furthers the statutory purpose of promoting uniformity in the technical and operational rules governing CMRS and, thereby, will minimize the potentially distorting effects on the market of asymmetrical regulation. By contrast, a narrow interpretation would allow for the continuation of various regulatory distinctions, a result that is at odds with the statute's goal of eliminating technical regulatory incongruities among different services that compete or will compete with one another. Because a broad reading of the term comports more closely with our understanding of congressional intent,[24] we adopt that reading.

27. Second, as discussed below, our analysis of actual and potential competition supports our conclusion that all commercial mobile radio services are substantially similar for purposes of devising technical and operational rules. As numerous commenters point out, actual competition among certain CMRS services exists already and, more importantly, the potential for competition among all CMRS services appears likely to increase over time due to expanding consumer demand and technological innovation. Such conditions argue for defining the class of "substantially similar" services expansively, for the purpose of establishing baseline technical and operational rules. This characterization of substantial

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[21] *See* paras. 37-43, *infra*.

[22] *CMRS Second Report and Order*, 9 FCC Rcd at 1418 (para. 13).

[23] *See* H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60 (House Report).

[24] *See* H.R. Rep. No. 103-213, 103rd Cong., 1st Sess. 494 (1993)(Conference Report)(intent of Congress is that, "consistent with the public interest, similar services are accorded similar regulatory treatment.").

similarity, we conclude, is the surest and most reasonable means of achieving our objectives in this rule making and also is supported by our application of criteria adapted from antitrust principles and case law.

28. Finally, we reject arguments that substantial similarity should be judged by technical differences among services. To the extent that such technical distinctions result from previously disparate regulatory requirements, it is the purpose of the statute and the intent of the Commission to eliminate, to the extent practical, such disparities in regulation.

2. *Background and Pleadings*

29. Last year, Congress created the CMRS classification in order to establish a consistent regulatory framework for all commercial mobile radio services. The creation of a symmetrical regulatory framework for the regulation of similar commercial mobile radio services is an essential step toward achieving the overarching congressional goal of promoting opportunities for economic forces -- not regulation -- to shape the development of the CMRS market.[25] Accomplishing this goal will encourage efficient investment in new services and technologies to meet the demands of consumers for mobile telecommunications services. As one step toward achieving that goal, Congress directed us to revise our rules to ensure that CMRS licensees in reclassified services "are subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services."[26]

30. Therefore, if we find that reclassified services are substantially similar to common carrier services for purposes of implementing Section 332 of the Act, as amended by the Budget Act, we must revise the technical and operational rules, to the extent necessary and practical, to assure that licensees in reclassified services have technical and operational[27] rules that are comparable to those rules for substantially similar common carrier services. The *CMRS Second Report and Order* found that licensees in the following Part 90 services could provide CMRS, if their service offering meets the three-pronged definition of CMRS: 800 MHz and 900 MHz Specialized Mobile Radio (SMR) Service (Part 90, Subpart S), Business Radio Service (Part 90, Subpart D), 220-222 MHz commercial two-way nationwide

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[25] *E.g., CMRS Second Report and Order*, 9 FCC Rcd at 1418 (para. 13).

[26] Budget Act, § 6002(d)(3)(B).

[27] The *Further Notice* explained that although the statute refers to "technical" regulations, we believe Congress's use of the term can be construed to include operational as well as technical regulations affecting the delivery of service by CMRS licensees. *Further Notice*, 9 FCC Rcd at 2868 (para. 20, n.36).

and local service (Part 90, Subpart T), and Private Carrier Paging in the 150 MHz, 450 MHz, and 900 MHz bands (Part 90, Subparts D and P).[28]

31. The *Further Notice* requested comment on how determinations of "substantial similarity" should be made, both generally and specifically with respect to each reclassified Part 90 service.[29] We tentatively found that the analysis of whether services are substantially similar should focus primarily on the services provided to end users and the extent to which such services meet substantially similar customer needs and demands.[30] The *Further Notice* requested comment on specific factors we should use under this approach to determine whether specific CMRS offerings are competitive with other CMRS services. We suggested several possible criteria for determining "substantial similarity," including: observing the way various CMRS services are marketed to customers; examining whether customers are actually choosing between two services when deciding which mobile service to use; or examining a combination of marketing strategies and customer considerations.[31]

32. In addition, the *Further Notice* attempted to analyze and reach tentative conclusions regarding whether each specific reclassified service could be considered substantially similar to a specific common carrier service.[32] For example, we tentatively viewed wide-area SMR service as substantially similar to cellular service, but suggested that local SMR systems may be less analogous to cellular than to traditional common carrier radiotelephone service provided by Improved Mobile Telephone Service (IMTS) licensees.[33]

33. Most commenters do not attempt to identify factors the Commission should use to determine substantial similarity. Many parties agree with the Commission's general proposal to base substantial similarity on whether services meet similar customer demands.[34] Some commenters, however, argue that the Commission should take into account other factors for

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[28] *CMRS Second Report and Order*, 9 FCC Rcd at 1449-53 (paras. 84-97).

[29] *Further Notice*, 9 FCC Rcd at 2866 (para. 12).

[30] *Id.* at 2866-67 (para.13).

[31] *Id.* at 2867 (para. 14).

[32] *Id.* at 2867-68 (paras. 15-19).

[33] *Id.* at 2867 (paras. 15-16).

[34] McCaw Comments at 21; New Par Comments at 2; NYNEX Comments at 3; PageNet Comments at 12; PCIA Comments at 4-5; Vanguard Comments at 3-4; *see also* Geotek Reply Comments at 2-3 (not disputing Commission's test, but claiming the *Further Notice* misapplied the test with respect to wide-area SMRs).

determining substantial similarity.[35] For example, Brown suggests that, among the elements which the Commission is required to assess in determining whether services are substantially similar, is whether they both enjoy exclusive use of a channel.[36] US Sugar argues that substantial similarity should be determined by technical characteristics such as a system's geographical range, system architecture, user and service characteristics, and future service plans.[37] Similarly, E.F. Johnson asserts that the Commission should look at the objective capability of carriers to compete, as measured by the amount and position of spectrum and the extent of application of frequency reuse, not the subjective perceptions of consumers.[38]

34. Commenters generally examine substantial similarity with regard to each individual reclassified Part 90 service. Many parties agree that wide-area SMRs are substantially similar to cellular.[39] Some reply commenters, however, claim that wide-area SMR providers, such as Nextel, compete with traditional SMR providers rather than cellular providers.[40] Additionally, some parties disagree about whether 900 MHz SMRs can be wide-area service providers.[41] Most commenters contend that "local" SMRs are not substantially

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[35] AMTA Comments at 6; AMTA Reply Comments at 4; Brown Comments at 6-7; E.F. Johnson Comments at iii; E.F. Johnson Reply Comments at 13; ITA/CICS Comments at 5; UTC Comments at 2.

[36] Brown Comments at 6-7; *see also* Celpage Comments at 7-8; Metrocall Comments at 7-8; Network Comments at 7-8; RAM Tech Comments at 7; UTC Comments at 2.

[37] US Sugar Comments at 8; *see also* ITA/CICS Comments at 5.

[38] E.F. Johnson Reply Comments at 13.

[39] Dial Page Comments at 1-2 (anticipating its wide-area SMR system will compete with cellular); E.F. Johnson Comments 4 (referring only to 800 MHz SMRs); McCaw Comments at 22; NYNEX Comments at 3; PCIA Comments at 5; Pittencrieff Comments at 2-3; RF Tech Comments at 2; RMR Comments at 2-3; Southwestern Bell Comments at 3; Southwestern Bell Reply Comments at 10; Sprint Comments at 4; Sprint Reply Comments at 1-2; Vanguard Comments at 5-6; *but see* AMTA Comments at 8 (claiming wide-area SMR service *will be* substantially similar to cellular service); AMTA Reply Comments at 6-7 (arguing wide-area SMRs cannot achieve comparability under the existing regulatory scheme); NABER Comments at 6-7 (contending wide-area SMRs are not similar enough to cellular systems to warrant substantial change in the way SMR systems are regulated); PCC Comments at 2-3 (arguing that these services are not substantially similar because of service area and interoperability rules).

[40] Airwave Reply Comments at 5; ATG Reply Comments at 8-9; Joriga Reply Comments at 7; Kay Reply Comments at 7; NABER Reply Comments at 4; Spruill Reply Comments at 6-7; *see also* Southern Reply Comments at 17-18.

[41] *Compare* E.F. Johnson Comments at 5 n.7 *with* Geotek Comments at 3-5; *see also* AMTA Comments at 9-10 (contending that certain SMR systems do not fit neatly within either the wide-area SMR category or the traditional SMR category).

similar to cellular or any other Part 22 service, apparently basing their conclusions on technological rather than market factors.[42] Similarly, for technical reasons, the vast majority of commenters contend that 220-222 MHz service is not substantially similar to any Part 22 service.[43] Commenters who address the issue argue that Business Radio Service is not substantially similar to any services provided by common carrier licensees.[44]

35. With regard to paging, many parties agree that Part 90 and Part 22 paging services are substantially similar.[45] NABER and PageNet claim that Part 90 and Part 22 paging at 900 MHz are substantially similar to each other.[46] NABER, however, argues that the Commission should maintain special rules for private carrier paging (PCP) licensees below 929 MHz because they operate on shared channels.[47] Several commenters also address the issue of how to treat CMRS providers that offer paging service in conjunction with other commercial services. RF Tech recommends that the Commission consider the ability of wide-area SMRs to provide paging services over their infrastructure and the concerns this may raise regarding the bundling of services and the competitive advantage these wide-area SMR providers will have because paging licensees will not be able to offer mobile telephone

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[42] American Radio Reply Comments at 4-5; AMTA Comments at 8-10; E.F. Johnson Comments at 5-6; NABER Comments at 7-8; PCC Comments at 3-4; RF Tech Comments at 2; Southeastern Reply Comments at 5-7; *but see* RMD Reply Comments at 3 (arguing cellular and SMR systems compete in certain markets for certain customers, but 900 MHz SMR systems will never be able to compete effectively); Southwestern Bell Reply Comments at 8-9; Vanguard Comments at 6-7 (arguing that local SMRs are substantially similar to cellular).

[43] AMTA Comments at 20-21; AMTA Reply Comments at 25; E.F. Johnson Comments at 6; Global Comments at 2; NABER Comments at 8; RF Tech Comments at 3; RF Tech Reply Comments at 3; SEA Comments at 4; SEA Reply Comments at 3; Simrom Comments at 4-7 (also argues that interconnected 220 MHz service should be considered substantially similar to narrowband PCS); *but see* APC Comments at 2 n.4 (arguing it is too early to tell whether 220 MHz licensees will provide services that will be competitive with PCS, cellular, and SMR); SmartLink Comments at 3 (suggesting that Commission defer determination because it is not a mature market); SunCom Comments at 1 (220 MHz narrowband systems are substantially similar to other mobile service systems and must be afforded an opportunity to compete with them on a level playing field); SunCom Reply Comments at 5-6.

[44] E.F. Johnson Comments at 7 (claiming interconnected Business Radio Service is more similar to local SMR service than to cellular service); NABER Comments at 9; RF Tech Comments at 3.

[45] APACG Comments at 3-4; McCaw Comments at 23-24; PCIA Comments at 5; Vanguard Comments at 7-8.

[46] NABER Comments at 9; PageNet Comments at 12.

[47] NABER Comments at 9-10.

services with their pagers.[48] Dial Page, however, contends that although many CMRS services such as cellular, SMR, and PCS are expected to offer paging and short messaging as ancillary services and therefore will provide competition to paging, paging is not competitive with mobile phone and other services offered by these carriers.[49]

36. Some commenters take a broader approach to determining whether services are substantially similar. New Par, for example, claims that CMRS is divisible into two distinct product markets: (1) two-way services (voice and data); and (2) one-way (including acknowledgement paging and other messaging services).[50] With respect to two-way voice and data services, New Par believes that those CMRS services which should be classified as substantially similar include cellular, mobile satellite service (MSS), interconnected SMR (both wide-area and non-wide-area), interconnected Business Radio Service, and 220-222 MHz services.[51] New Par urges the Commission to classify services as substantially similar based on the marketing techniques of CMRS providers or the conduct of customers, rather than current channel capacity, technical quality, or geographic range.[52] US West argues that all "broadband" CMRS is interchangeable from the perspective of the customer, and thus should be treated as substantially similar.[53] US West contends that such treatment will promote regulatory symmetry, be more reflective of market realities, accommodate market changes and technological innovation, and minimize regulatory burdens.[54] US West maintains that "narrowband" CMRS (which US West describes as narrowband PCS and paging) should not be treated as substantially similar to broadband CMRS because there are material

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[48] RF Tech Comments at 4.

[49] Dial Page Comments at 6.

[50] New Par Comments at 3.

[51] *Id.* at 4.

[52] *Id.* at 3-4. New Par also claims that the fact that CMRS providers do not compete on every level of the market, but rather choose to target a specific market niche or sub-market, does not mean that they do not compete for the same customer base. *Id.* at 4.

[53] US West Comments at 4. Without defining the term "broadband," US West reaches its conclusion by reasoning that all users of broadband CMRS have a basic characteristic in common: a need for telecommunications that cannot be met (or met effectively) with wireline services. *Id.* US West concedes that there is a wide diversity of mobile services and that mobile licensees historically have marketed their services to different groups of consumers. *Id.* US West contends, however, that "persons interested in initiating telecommunications while on the move can use any broadband CMRS offering, a fact which makes such services 'reasonably interchangeable.'" *Id.* at 4 & n.9.

[54] *Id.* at 3-4.

distinctions between these types of services, from a customer's perspective.[55] Southwestern Bell urges the Commission to go further and find that all services that meet the definition of CMRS, or their functional equivalent, are substantially similar to each other.[56] According to Southwestern Bell, commenters who requested that their service be treated differently were making "self-serving" claims.[57]

3. *Discussion*

a. Examination of Competition

(1) *General Approach*

37. In light of our stated policy goals, we have concluded that we should adopt an expansive view of the extent of actual or potential competition in the commercial mobile radio services marketplace for purposes of examining the technical and operational rules governing these services. In other words, we will determine the reclassified services that are "substantially similar" to common carrier services based upon a broad assessment of whether licensees in these services are actual or potential competitors with one another. This broad approach will take into account the rapid changes in technology and the resultant dynamic nature of the mobile services marketplace.[58] We believe that changing technology and increasing consumer demand will allow CMRS licensees to use spectrum allocated for a variety of commercial mobile radio services to provide competing services that meet specific consumer needs.

38. In addition to seeking comment regarding the extent of competition across a range of reclassified private services and existing common carriage offerings,[59] the *Further Notice* asked interested parties to address specific reclassified private services, with a view toward determining whether each service is substantially similar to any existing common carrier

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[55] *Id.* at 3 n.7.

[56] Southwestern Bell Comments at 2-3; Southwestern Bell Reply Comments at 6.

[57] Southwestern Bell Reply Comments at 7.

[58] *See* US West Comments at 4-5 (contending that the Commission must take into account the dynamic nature of the telecommunications marketplace in devising rules regarding the "substantial similarity" of CMRS offerings).

[59] *See Further Notice*, 9 FCC Rcd at 2867 (para. 14)("We invite commenters . . . to provide specific comparisons between formerly private services that have been reclassified as CMRS and *all* existing common carrier mobile services.")(emphasis added).

mobile service.[60] In responding to the *Further Notice,* most commenters have taken a relatively narrow view of CMRS competition. In general, commenters have attempted to describe the current state of competition between specific reclassified services and existing common carrier mobile services. In addition, several commenters discuss constraints on competition based on the technological design and current service rules for reclassified services.[61] Thus, many commenters do not take an overall view of the CMRS marketplace, or consider the potential for competition in the CMRS marketplace.

39. We believe, however, that the best way to ensure that we create an enduring regulatory system that applies comparable technical and operational rules to similar CMRS licensees, is to anticipate the potential for increasing competition by providing sufficient flexibility to licensees in our rules. This flexibility will enable them to adapt their services to meet customer demands. If the Commission were to ignore the accelerating pace of technology or the ability of CMRS providers to respond to growing and changing consumer demand for mobile radio services, our technical and operational rules might inhibit rather than promote competition and growth in the mobile services marketplace. Therefore, we will not limit our examination to the manner in which services are provided today. Rather, we will also consider the potential for new service offerings to use existing CMRS spectrum to meet future consumer demands.

40. In deciding that current and potential competition are the best measures for determining whether services in the CMRS marketplace are substantially similar, we also have concluded that the narrower measurements propounded by some of the commenters would not be as effective or appropriate in serving the objectives of this proceeding. First, we believe it would be somewhat circular to conclude that Part 90 technical and operational rules applicable to reclassified private carriers should not be conformed to rules governing existing CMRS providers, on the basis that such reclassified carriers are not "substantially similar" to common carriers *because* they are subject to different technical and operational rules. In instructing us to address the need to conform these technical and operational rules, Congress presumably took account of the fact that the rules are different. Application of the narrow test advocated by some commenters would seem to end the congressionally mandated analysis before it begins. We find no basis for such congressional intent.

41. Second, this narrow test would have the effect of freezing in place disparate provisions in our rules applicable to existing CMRS carriers and reclassified private carriers. This would seem to undermine our objective -- and the congressional mandate -- to create a symmetrical regulatory structure for all carriers competing in the CMRS marketplace.

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[60] *See Further Notice*, 9 FCC Rcd at 2867 (paras. 15-16)(SMR service), at 2867 (para. 17)(220-222 MHz service), at 2868 (para. 18)(business radio service), at 2868 (para. 19)(paging service).

[61] *E.g.*, Brown Comments at 6-7; Celpage Comments at 7-8; E.F. Johnson Reply Comments at 13; ITA/CICS Comments at 5; Metrocall Comments at 7-8; Network Comments at 7-8; RAM Tech Comments at 7; US Sugar Comments at 8; UTC Comments at 2.

Finally, a narrow test, under which the definition of "substantially similar" turns on the differences in technical and operational rules, would inhibit our overall objective of creating a regulatory framework in which flexibility is maximized, so that carriers have a real opportunity to use their allocated spectrum in ways that adapt quickly to changing consumer demand. We seek a regulatory environment in which carriers can take advantage of technological innovation to modify their service offerings to compete against other carriers in trying to serve emerging consumer needs and demand for new and varying types of wireless services.

42. We emphasized above that our overall objective of creating a regulatory regime for commercial mobile telecommunications services that will permit providers to compete efficiently has guided our determination of "substantially similar" services. It is important to recognize that a different set of policy goals, or the application of the same policy goals to differing circumstances, may require a different framework for analysis and result in different conclusions regarding the extent of competition. For example, in the context of our forbearance analysis,[62] the *CMRS Second Report and Order* focussed on the level of competition within individual categories of commercial mobile radio services, but we stated that "our doing so is not intended to prejudge the issue of whether, and to what extent, there is competition among these various services."[63] Rather than evaluating the potential for competition among various classes of CMRS services, as we do here, our forbearance analysis considered only actual competition in particular services. That approach was appropriate in order to ensure that the competitiveness of the marketplace was sufficient to permit the removal of regulatory restraints. Similarly, in the *CMRS Equal Access and Interconnection Notice*,[64] we tentatively concluded that the presence or absence of market

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[62] Pursuant to Section 332(c)(1)(A) of the Act, the Commission may forbear from enforcing any provision of Title II, except Sections 201, 202, and 208 with respect to a particular commercial service, if the Commission determines that: (1) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such provision is not necessary for the protection of the public interest; and (3) specifying such provision is consistent with the public interest. 47 U.S.C. § 332(c)(1)(A). As part of evaluating the "public interest" described in Section 332(c)(1)(A)(iii), Section 332(c)(1)(C) mandates that the Commission consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile service. . . ." 47 U.S.C. § 332(c)(1)(C). Since the third prong of the forbearance test requires the Commission to consider the effect of competition in the CMRS marketplace, we examined the nature of competition in the CMRS marketplace to assist us in our forbearance analysis. *See CMRS Second Report and Order*, 9 FCC Rcd at 1463-64 (paras. 125-126).

[63] *Id.*

[64] Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, RM-8012, Notice of Proposed Rule Making and Notice of Inquiry, FCC 94-145, released July 1, 1994 (*CMRS Equal Access and Interconnection Notice*).

power is an important factor in determining whether imposing equal access and other interconnection obligations on CMRS providers is in the public interest.[65] We applied a different analysis to different classes of CMRS providers, given the differing degrees of competition.[66] The goal of regulatory symmetry that we pursue in this Order might not apply, or might be offset by other regulatory goals and objectives, in other contexts such as the equal access and interconnection proceeding.[67]

43. In this Order, however, we determine that our policy goals and our understanding of the dynamic nature of the CMRS marketplace lead us to the conclusion that all commercial mobile radio services compete with one another, or have the potential to compete with one another, to meet the needs of consumers to communicate while on the move. In the future, our assessment of the competitive relationships among different service providers in the mobile services marketplace might vary from the approach we are taking here if, for example, the question before us is whether to extend additional forbearance measures only to certain classes of service providers.[68] The guiding principle in both instances is our goal of promoting competition and thus serving the interests of consumers.

(2) *Antitrust Principles*

44. We believe that it is useful, in assessing the similarity of various CMRS offerings, to examine related areas of law in which rules and principles have been developed for the purpose of promoting competition in the national economy. Several commenters have suggested that we examine certain aspects of antitrust law for this purpose.[69]

45. We have assessed two aspects of antitrust principles as part of our analysis of the CMRS marketplace. First, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have developed guidelines for determining whether a horizontal merger will

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[65] *Id.* at paras. 32-34, 124-126.

[66] *Id.* at paras. 35-49, 127.

[67] *Id.* at para. 127 ("Since the establishment of different interconnection obligations for different classes of CMRS providers would, by definition, result in a lack of symmetry in the regulation of CMRS providers, commenters should address the issue of whether the benefits that may be realized from differing interconnection obligations outweigh the costs that might result from this lack of regulatory symmetry.").

[68] This issue of additional forbearance is under exploration in a related rule making proceeding. *See* Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GN Docket No. 94-33, Notice of Proposed Rule Making, 9 FCC Rcd 2164 (1994).

[69] *See, e.g.*, New Par Comments at 2 n.2; Southern Reply Comments at 20-23; US West Comments at 4 & n.9.